ATTORNEY FOR APPELLANT:

NEIL L. WEISMAN
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JOSEPH A. RUTHRAUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0808-CR-450
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0610-FD-1055

December 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Joseph A. Ruthrauff was convicted of Class C misdemeanor Operating a Motor Vehicle While Intoxicated[1] and Operating a Motor Vehicle While Intoxicated With a Prior Conviction, a Class D felony.[2] Ruthrauff challenges the sufficiency of the evidence to support his convictions. Concluding that there is sufficient evidence to support Ruthrauff's convictions, but that his two convictions, while "merged" for sentencing purposes, violate double jeopardy, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On October 11, 2006, St. Joseph County Police Officer James Rutkowski observed Ruthrauff's vehicle stopped at a red light in South Bend. As Officer Rutkowski approached the intersection, Ruthrauff's vehicle suddenly made a right-hand turn and nearly struck another vehicle. Officer Rutkowski followed Ruthrauff to determine if his driving was impaired. Officer Rutkowski observed Ruthrauff's vehicle swerve and cross traffic lanes. In addition, Ruthrauff's vehicle made a sudden lane change without signaling, "veered off" onto the shoulder, narrowly avoided colliding with a guardrail, and turned right onto an adjacent street without signaling the turn. Tr. p. 85. Officer Rutkowski activated his overhead lights and initiated a traffic stop.

As Officer Rutkowski approached Ruthrauff's vehicle, he noticed the smell of alcoholic beverages. Based on Ruthrauff's driving behavior, the odor of alcoholic beverages, and Ruthrauff's failure to answer questions, Officer Rutkowski conducted a

[1] Ind. Code § 9-30-5-2(a) (2006).

[2] Ind. Code § 9-30-5-3 (2006).

series of field sobriety tests. Ruthrauff admitted that he had consumed one alcoholic beverage earlier in the evening. Officer Rutkowski first administered the "nine step walk and turn" test, but Ruthrauff failed to follow directions and later said he could not complete the test due to hip problems. Subsequently, Officer Rutkowski administered the "finger count test" and the "horizontal gaze nystagmus test," but Ruthrauff again failed to follow directions. During the tests, Ruthrauff was "unsteady," his speech was "slurred," and he smelled like alcoholic beverages. Tr. p. 90. Officer Rutkowski arrested Ruthrauff and transported him to the St. Joseph County Jail.

At the jail, St. Joseph County Police Officer Troy Webb attempted to administer a blood alcohol content test on Ruthrauff. Ruthrauff did not follow instructions to blow a constant stream of air, and the test was rendered invalid. Ruthrauff did not attempt a second test. At some point, Ruthrauff indicated that he had diabetes, and he received medical treatment for diabetes during his incarceration. According to jail records, Ruthrauff was not symptomatic during his incarceration.

On October 12, 2006, the State charged Ruthrauff with operating a motor vehicle while intoxicated (Count I) and operating a motor vehicle while intoxicated with a prior conviction (Count II). At a February 14, 2008 bifurcated trial, a jury found Ruthrauff guilty of Count I in the first phase of the trial. In the second phase, the parties stipulated that Ruthrauff had been previously convicted of operating a motor vehicle while intoxicated in March 2004, and the jury found Ruthrauff guilty of Count II. The trial court entered judgment of conviction on both counts. A sentencing hearing was held on March 14, 2008, during which the trial court "merged" Count I into Count II for

sentencing purposes and sentenced Ruthrauff to three years in the St. Joseph Community Corrections Center program. This appeal follows.

DISCUSSION AND DECISION

On appeal, Ruthrauff challenges the sufficiency of the evidence to support his convictions for Counts I and II. Before we address the issue, we observe, *sua sponte* that Ruthrauff's convictions for Count I, which is a lesser-included offense of Count II, and Count II violate double jeopardy. *See Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002). We recognize that the trial court "merged" these convictions for sentencing purposes. However, a judgment of conviction constitutes punishment even when no sentence is imposed. *See Carter v. State*, 750 N.E.2d 778, 780 (Ind. 2001). Accordingly, we conclude that "merger" for sentencing purposes was inadequate to cure the instant double jeopardy violation, and we remand with instructions to vacate Ruthrauff's conviction for Count I. *See Morrison v. State*, 824 N.E.2d 734, 741-42 (Ind. Ct. App. 2005), *trans. denied*.

We next address Ruthrauff's sufficiency challenge. Our standard of review for sufficiency of the evidence claims is well-settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id*. It is the function of the trier

of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Indiana Code section 9-30-5-29(a) (2006) provides that "a person who operates a vehicle while intoxicated commits a class C misdemeanor." This offense, however, is a Class D felony if a person: (1) operates a motor vehicle while intoxicated and (2) has been previously convicted of operating a motor vehicle while intoxicated within the past five years. Ind. Code § 9-30-5-3. "Intoxicated" is defined as being under the influence of alcohol "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86 (2006). Here, Ruthrauff contends that there was inadequate evidence to demonstrate that he was intoxicated. Instead, Ruthrauff claims that his diabetes and a physical impairment caused him to appear intoxicated.

Intoxication may be established through evidence of "consumption of significant amounts of alcohol, impaired attention and reflexes, watery or bloodshot eyes, an odor of alcohol on the breath, unsteady balance, failed field sobriety tests and slurred speech." *Mann v. State*, 754 N.E.2d 544, 547 (Ind. Ct. App. 2001), *trans. denied*. Here, Ruthrauff exhibited erratic driving behavior, failed to answer questions, repeatedly failed to follow instructions, had slurred speech, exhibited poor manual dexterity, smelled of alcohol, and failed field sobriety tests. This evidence is sufficient to support a finding of intoxication. *See Mabbitt v. State*, 703 N.E.2d 698, 701 (Ind. Ct. App. 1998) (concluding that "evidence of poor driving skills, failed field sobriety tests, difficulty with physical dexterity, and/or the smell of alcohol upon a driver was sufficient to sustain a conviction

for operating a motor vehicle while intoxicated"). Ruthrauff presented the jury with the above alternative medical explanations for his behavior, but the jury was within its discretion to disbelieve those explanations. Ruthrauff's challenge is simply an invitation to reweigh the evidence, which we decline to do.

The judgment of the trial court is affirmed in part, reversed in part, and remanded.

RILEY, J., and BAILEY, J., concur.